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No. 81-2257

In the Supreme Court of the United States

OCTOBER TERM, 1982

BILL JOHNSON'S RESTAURANTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner filed a lawsuit against employees in state court in order to punish one employee for filing unfair labor practice charges against petitioner; to punish several employees for picketing petitioner; to discourage employees from the further exercise of their rights under Section 7 of the National Labor Relations Act, 29 U.S.C. 157; and to interfere with a pending Board proceeding.

2. Whether the Board properly ordered petitioner to cease prosecuting its civil action against the employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A13) is reported at 660 F. 2d 1335. The decision and order of the National Labor Relations board (Pet. App. A14-A57) are reported at 249 N.L.R.B. 155.

JURISDICTION

The judgment of the court of appeals was entered on November 12, 1981. A petition for rehearing was denied on March 2, 1982. The petition for a writ of certiorari was filed on May 28, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at pages A1-A2 of the petition.

STATEMENT

1. Ruth Helton was discharged from her job as a waitress in petitioner's restaurant, Big Apple East, on August 8, 1978 (Pet. App. A4, A24). The discharge occurred within days after she suggested to other waitresses that they should get a union to represent them (*id.* at A4, A22-A24). Helton was told that she was being terminated because of her "attitude" and because a member of management did not like a question she had asked at a recent meeting (*id.* at A4, A24). On August 9, Helton filed a charge with the National Labor Relations Board, and on September 20 the General Counsel issued a complaint alleging that petitioner had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging Helton for engaging in protected, concerted activities (*id.* at A4-A5, A19, A24).

Meanwhile, on September 18, waitresses Nichols, Scott, and Michaud walked out of the restaurant to protest Helton's discharge and their unfair treatment (Pet. App. A4, A8, A30-A32). On September 20, the day the unfair labor practice complaint was issued, the three joined Helton and a few others in picketing the restaurant (*id.* at A5, A32). Their picket signs said that petitioner had been accused of unfair labor practices and asked the public to boycott the restaurant (*id.* at A5, A32). The pickets walked along the sidewalk in front of the restaurant and crossed two driveways leading to the restuarant's parking lot, but they did not block access to the lot or to the restaurant. At no time did the pickets number more than seven adults and two children (*id.* at A5, A10, A32, A41-A42).

Shortly after the pickets first appeared, Manager Sturgeon, a member of the family that owns and operates petitioner, confronted them and took down their names (Pet. App. A5, A21 A32-A33). She said, "[y]ou might think you're funny, but I intend to have the last laugh. I will get

even with you for what you're doing." She also said, "[y]ou're going to all pay for this," and she told Helton, "Ruth, I'll get even with you if it's the last thing I do" (*id.* at A5, A32-A33). That afternoon, petitioner's president, Gene Johnson, telephoned waitress Nichols and asked to speak to her husband (*id.* at A5, A33-A34). Johnson asked Carl Nichols why he and his wife had been picketing the restaurant. When Nichols said it was to protest Helton's discharge, Johnson responded that she would hate to see the Nichols lose their new home and "get hurt by all of this" (*id.* at A5, A33-A34).

Picketing continued on Thursday and Friday, September 21 and 22 (Pet. App. A5, A34). On the latter date, the pickets distributed a leaflet that stated (*id.* at A5-A6, A34-A35):

> THE [NLRB] HAS ISSUED A COMPLAINT AGAINST THE BIG APPLE RESTAURANT * * * FOR UNFAIR LABOR PRACTICES.
>
> The complaint was issued as a result of charges filed by Myrland Helton, a former employee who was fired August 8, after suggesting to other waitresses they should organize a union. Mrs. Helton had been an employee of the Big Apple seven and one half years.
>
> Several other waitresses have quit their jobs to join Mrs. Helton in picketing the restaurant to inform the public of the dispute between the employees and the restaurant's management. Among the waitresses' complaints are the following:
>
> * Eight hour shifts with no specified breaks.
> * No pay for overtime when waitresses were required to remain at their posts until their last customer's check had been paid.

- Waitresses threatened with dismissal if they lost any time due to illness over the Christmas holiday season.
- Inconsistent management practices.
- Unwarranted sexual advances.
- A filthy restroom for women employees, with no soap, paper towels or toilet tissue provided.

EMPLOYEES OF BILL JOHNSON'S BIG APPLE FOR JUSTICE ON THE JOB.

On September 25, petitioner filed a civil complaint in state court against Helton and the pickets. The complaint alleged that they had engaged in mass picketing, had blocked public access to the restaurant, and had created a threat to public safety. The complaint also alleged that the pickets had distributed a leaflet containing "false and outrageous statements, including misrepresentations of proceedings pending before the [NLRB]." The complaint sought actual damages, $500,000 in punitive damages, and an order enjoining the pickets from trespassing, mass picketing, violence, interfering with the restaurant's business operations, and publishing false and misleading statements about the restaurant and its management (Pet. App. A6, A35). At the same time, petitioner filed a motion to shorten the time for taking depositions and to permit the deposition of Helton and her husband just two days later on September 27 (*id.* at A36). Notices of depositions on September 27 were served on all the defendants (*ibid.*).

The hearing on the temporary restraining order was scheduled for noon that same day (Pet. App. A36). The hearing was attended by three of the pickets, none of whom was represented by counsel. The court issued an order granting most of the relief requested, but refused to enjoin

the distribution of leaflets or picketing by small groups (*id.* at A6, A36; Tr. 339-340, 137-138; GCX 2(e)). The hearing on the request for a preliminary injunction was set for October 5 (*id.* at A6, A36).

On September 26, the picketing continued, and Helton retained an attorney to represent her (Pet. App. A6, A36). On October 2, petitioner's attorney deposed Helton and asked numerous questions about the nature and extent of her union activities, the identities of other employees involved in union activities, and management's knowledge of those activities (*id.* at A6, A11, A37). Helton and the other defendants were also questioned about matters relevant only to petitioner's defense in the pending unfair labor practice proceeding (*id.* at A37). On November 16, the state court denied petitioner's request for a preliminary injunction. The suit for a permanent injunction and damages is still pending (*id.* at A6, A38).

2. Adopting the decision of the administrative law judge, the Board found that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by discharging Helton because of her union activities, and that petitioner had violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by threatening the pickets with reprisals. The Board also found that petitioner had violated Section 8(a)(1) and (4) of the Act, 29 U.S.C. 158(a)(1) and (4), by initiating the lawsuit in order to punish Helton for filing the unfair labor practice charges, to punish Helton and the others for picketing the restaurant, to discourage them from engaging in other protected, concerted activity, and to interfere with the pending Board proceeding. Finally, the Board found that petitioner had violated Section 8(a)(1) and (4) of the Act by deposing the defendants concerning the subject matter of the pending unfair labor practice proceeding for the purpose of circumventing the Board's

restrictive discovery rules and gaining access to the General Counsel's case (Pet. App. A14-A15, A29, A32-A52).[1]

In finding that the filing of the lawsuit was unlawful, the administrative law judge concluded that petitioner "did not have a reasonable basis for the filing of its lawsuit" (Pet. App. A40). He found no basis for petitioner's allegation in its complaint that the leaflet contained false, outrageous, or malicious statements, or for the allegations that the pickets blocked the sidewalk and harassed customers, and he termed "pure folly" petitioner's allegation that, contrary to the picket signs, no boycott or strike was in progress (*id.* at 40-41). Similarly, he found that the leaflets contained no "misrepresentations concerning the Board's proceeding[s]" and accurately reflected the waitresses' complaints (*id.* at A41).

The Board ordered petitioner, *inter alia*, to reinstate Helton with backpay, to reinstate the three striking waitresses,[2] to withdraw the civil suit, and to reimburse Helton and the other defendants in that suit for the legal expenses they had incurred as a result of that action (Pet. App. A14-A15, A42-A55).

3. The court of appeals upheld the Board's decision and enforced its order.

The court found "substantial evidence in the record to support the Board's findings that the restaurant's lawsuit

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[1]The Board also found that petitioner had violated Section 8(a)(1) of the Act when, after Helton's discharge, a member of management twice asked a hostess whether Helton was having "any contact with any of the girls" and whether any of the other waitresses were talking about the union. In addition, the Board found that petitioner had violated Section 8(a)(1) and (4) of the Act when a member of management questioned a former employee about a supervisor's knowledge of employee union activities (Pet. App. A29-30, 38, 51-52).

[2]Although the Board upheld the judge's finding that the waitresses were not discharged, it concluded that they were entitled to reinstatement as unfair labor practice strikers (Pet. App. A-14 n.2).

lacked a reasonable basis in fact, and that it was filed to penalize Helton for filing charges with the Board and to penalize the picketers for engaging in protected activity" (Pet. App. A10). The court noted (Pet. App. A10-A11):

> The restaurant produced no evidence to support its suit to enjoin the picketing. The allegations of mass picketing, trespass, and the resultant blocking of restaurant entrances and danger to the public were totally unsubstantiated * * *. The mass picketing alleged in the complaint never materialized * * *.
>
> The restaurant also lacked a reasonable basis in fact for its libel suit. To prove libel in the context of a labor dispute, an employer must prove that the employees made false, defamatory statements, and that the statements were made with 'actual malice' * * *. [T]he restaurant produced no evidence to show that the picketers made the statements with reckless disregard for the truth or falsity of the statements.

The court also relied on management's threats to Helton and the pickets, including Manager Sturgeon's promise to "get even with you if it's the last thing I do" (Pet. App. A11-A12).

The court rejected petitioner's contention (Pet. App. A11) that "its lawsuit had a reasonable basis because the complaint on its face was subject to state court jurisdiction." The court stated (*ibid.*) that "[m]ore than a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis."

The court further rejected petitioner's assertion that the Board could not order the employer to withdraw the state court action, stating (Pet. App. A12):

> Since the Board properly found that the filing of the state court action was an unfair labor practice, it follows that the Board can order the employer to cease and desist from that practice.

The court added (Pet. App. A12-A13):

> It is true that the regulatory scheme established by the National Labor Relations Act does not of itself preempt state court jurisdiction over actions for libel arising in a labor context. *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 * * * (1966). The Supreme Court has recognized the potential of such state suits for interference with federally protected rights, however, and has consequently ruled that all state libel actions are preempted unless they are based upon defamatory statements published with knowledge of their falsity or with reckless disregard of truth or falsity. *Id.* at 65. This carefully drawn boundary between legitimate state and federal interests would be hopelessly obscured if a libel action was automatically sustainable so long as the plaintiff carefully drafted its complaint to allege malice. The proper test of the legitimacy of the state action is whether the plaintiff has evidence to support its allegations of malice. * * *
>
> The state court, of course, is competent to determine whether an employer who brings a libel suit has evidence to support his allegations. The same determination, however, is one which the Board must make to decide whether filing the libel suit was an unfair labor practice. Since the Board has actually decided the issue, and the subject is central to the enforcement of federal labor policy, the Board's decision would appear to preempt further action by the state court * * *. Whether or not the state court's jurisdiction is technically preempted, however, the Board has the power to enjoin a state court lawsuit when the impropriety of that lawsuit is properly addressed and adjudicated by the Board.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review by this Court is not warranted.

1. As the court of appeals correctly stated (Pet. App. A9), "it is not an unfair labor practice for an employer to file and prosecute a civil lawsuit against an employee, so long as the suit is filed in good faith and not in furtherance of an unlawful objective."[3] See *George A. Angle* v. *NLRB*, Nos. 79-1548 and 80-2057 (10th Cir. July 16, 1982), slip op. 6-7; *United Credit Bureau of America, Inc.* v. *NLRB*, 643 F. 2d 1017, 1022, 1023 (4th Cir.), cert. denied, 454 U.S. 994 (1981); *Power Systems, Inc.* v. *NLRB*, 601 F. 2d 936, 939 (7th Cir. 1979). Petitioner does not appear to dispute this principle. Rather, it contends (Pet. 4, 5, 6-7) that the Board could not inquire into petitioner's actual motivation for filing the suit because petitioner's civil complaint had "a lawful objective on its face," *i.e.*, it stated a claim upon which relief could be granted under state law. There is no merit to this contention. The "potential chilling effect of * * * lawsuits [filed in retaliation for seeking recourse to the Board]" *(United Credit Bureau, of America, Inc., supra,*

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[3]It is the Board's policy that it "should accommodate its enforcement of the Act to the right of all persons to litigate their claims in court, rather than condemn the exercise of such right as an unfair labor practice," but that a lawsuit, or a threat to file one, nevertheless violates the Act if it is "a tactic calculated to restrain employees in the exercise of rights guaranteed by the Act." *Clyde Taylor Co.*, 127 N.L.R.B. 103, 108, 109 (1960); see also *International Organization of Masters, Mates and Pilots (Cove Tankers)*, 224 N.L.R.B. 1626 (1976), aff'd, 575 F. 2d 896 (D.C. Cir. 1978); *Television Wisconsin, Inc.*, 224 N.L.R.B. 722, 779-780 (1976); *United Stanford Employees, Local 680 (Leland Stanford Junior University)*, 232 N.L.R.B. 326, 331 (1977). As the court below noted (Pet. App. A13), the Board has rarely invoked "limitations on the right to bring suit in state court."

643 F. 2d at 1023, see *Power Systems, Inc., supra*, 601 F. 2d at 940), could not be averted if, as the court below correctly noted, only "a carefully drawn complaint is required to avoid a finding that a lawsuit lacks a reasonable basis" (Pet. App. A11).

Contrary to petitioner's contention (Pet. 4-7), the standard employed by the court below—*i.e.*, whether there was a reasonable basis in fact for the state court suit[4] and whether petitioner was motivated by legitimate considerations in filing the suit—does not conflict with that of other circuits. Thus, in *United Credit Bureau, of America, Inc., supra*, a case much like the instant case, the Fourth Circuit enforced a Board order requiring an employer to terminate its civil suit against an employee because that suit lacked a reasonable basis in fact. In addition, the court specifically approved the Board's reliance upon the employer's failure to adduce any evidence to support the allegations of its suit (643 F. 2d at 1024-1025). Similarly, in *Power Systems, Inc., supra*, 601 F. 2d at 939, the Seventh Circuit did not dispute the Board's position that an improper motive could be inferred where an employer lacked a "reasonable basis for its suit." Instead, the court merely found that the employer in that case had adduced sufficient evidence to show that its suit had a reasonable basis.[5] Finally, in *George A. Angle* v. *NLRB*,

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[4]Petitioner asserts (Pet. 4, 7, 8, 12) that the court of appeals required it to prove that it would ultimately prevail on the merits of its lawsuit in order to avoid an unfair labor practice finding. However, the court required only that petitioner demonstrate that its claim was "a colorable one" having "a reasonable basis in fact" (Pet. App. A10).

[5]The other two cases cited by petitioner (Pet. 6) are also consistent with the decision here. In *Lodges 743 and 1746, International Association of Machinists* v. *United Aircraft Corp.*, 534 F. 2d 422, 463-465 (2d Cir. 1975), the court upheld the Board's finding that an employer had not violated the Act by filing a civil suit against the union to recover for property damaged during a strike. In so doing, the court noted that "[t]he grounds for the Company's suit were not fabricated" (*id.* at 464)

supra, a case decided since the petition herein was filed, the Tenth Circuit enforced a Board order requiring an employer to terminate its state court suit against an employee for malicious prosecution in invoking the Board's contempt processes. The Court held, citing *Power Systems, Inc.*, that " 'the Board properly may examine the record for evidence of a reasonable ground for employer's civil [suit] and, finding none, may infer an unlawful objective and order appropriate relief * * *' " (slip op. at 8, n.2).

Because the court of appeals clearly applied the right legal standard in determining that petitioner committed an unfair labor practice, the remaining question is whether the court of appeals correctly concluded that substantial evidence supports the Board's finding that petitioner had no reasonable basis for filing its civil suit and that the suit was "brought for retaliation and intimidation of employees in their organizational rights" (Pet. App. A13). Those factual issues do not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 479 (1951). In any event, as shown in the Statement, *supra*, the facts amply support the Board's findings.

2. Petitioner contends (Pet. 8-9) that the decision below deprives it of the right to litigate its libel action in state court and is therefore contrary to *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966).[6] Petitioner's argument is based upon a false premise. Petitioner asserts (Pet.

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and that there was no other evidence of improper motivation. In *Associated General Contractors of North Dakota* v. *NLRB*, 637 F. 2d 556, 562 (8th Cir. 1980), the court upheld the Board's finding that an employer did not violate Section 8(a)(1) by seeking to enforce in state court a clause in a collective agreement, regardless of whether the clause was unlawful. The court held that an unlawful motive could not be inferred in the light of the Board's finding, which was supported by substantial evidence, that the filing of the lawsuit was not a tactic designed to interfere with the exercise of rights protected by the Act.

[6]In *Linn*, *supra*, 383 U.S. at 64-65, this Court limited the availability of state remedies for defamatory statements arising out of labor disputes to cases in which the plaintiff could show that the allegedly

8) that the court below held "that the plaintiff in the libel action may be denied an opportunity to prove his allegations in the state court proceeding unless he can first prove them to the satisfaction of an NLRB administrative law judge * * *." However, the court of appeals did not require a party in petitioner's position to prove its case before the Board. The court held merely that the Board may find that an unfair labor practice has been committed where the state court claim is not even colorable and is brought in bad faith and in furtherance of an unlawful objective (Pet. App. A9-A11). As the court stated (*id.* at A10), "[A]n employer who brings a good faith action against employees * * * and produces evidence making his claim a colorable one, is not guilty of an unfair labor practice simply because he ultimately loses the lawsuit on the merits." Here, as the court of appeals held, petitioner "produced no evidence to support its suit to enjoin the picketing" (*id.* at A10) and insufficient evidence to show "a reasonable basis in fact for its libel suit" (*id.* at A11). It was only for those reasons that petitioner was ordered to withdraw its civil suit. As the court below noted (*id.* at A13), the Board has issued such orders sparingly and only in cases of clear abuse.

3. Petitioner's reliance (Pet. 9-10) on *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), is similarly misplaced. In *Sears*, this Court held that the National Labor Relations Act did not prevent a state court from entertaining a trespass claim arising out of union picketing on an employer's premises where no proceedings before the Board had been commenced and where, as a consequence, there was no other forum in which the underlying question of labor law could

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actionable statements were made with knowledge of their falsity or with reckless disregard for the truth. It did so in order to insure that state regulation of defamation neither interfered with the Board's administration of national labor policy nor "dampen[ed] the ardor of labor debate" by permitting parties to a labor dispute to use libel suits "as weapons of economic coercion."

be adjudicated (436 U.S. at 185-187, 202, 203 n.34). Unlike the present case, which arose on petition for review of the Board's order and a cross-application for enforcement of that order, *Sears* arose from judicial proceedings in the state courts of California. Here, moreover, the Board was not required to conclude that the National Labor Relations Act divested the state court of jurisdiction of the subject matter of petitioner's suit. Rather, the Board found that petitioner's suit constituted unlawful discrimination against Helton and the other defendants based upon their exercise of rights protected by the Act, and the Board ordered termination of the suit for that reason alone. As the court of appeals observed, the Board had the power to do this "[w]hether or not the state court's jurisdiction [was] technically preempted" (Pet. App. A13). Thus, the decision in this case does not depend upon a question of preemption similar to that in *Sears*.

Furthermore, even if the *Sears* preemption analysis were applicable, it is fully consistent with the decision below. In *Sears*, the Court held (436 U.S. at 202) that "[t]he primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or [to] the NLRB, it must be presented to the Board." The Court added, however, that state court jurisdiction was not preempted "over arguably protected conduct when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so" (*id.* at 202-203; footnote omitted). Here, the Board's processes had been invoked, and the Board has found that petitioner's civil suit was groundless and was filed solely in retaliation for the defendants' protected conduct. In these circumstances, nothing in *Sears* permits petitioner to go forward with its baseless, retaliatory suit. Were petitioner's contention accepted, this Court's decision in *Sears*, which rested upon a perceived gap in the remedies available under the National Labor

Relations Act (436 U.S. at 202), would become a means of preventing the Board from affording relief for violations of that Act.[7]

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[7]Petitioner is also mistaken in contending (Pet. 10-11) that the anti-injunction statute, 28 U.S.C. 2283, prevented the Board from requiring petitioner to dismiss its state court suit. Petitioner's argument that the subject matter of the state court suit was neither "pending before the Board nor subject to its jurisdiction" (Pet. 11) is merely a reiteration of its assertion that the Board was precluded from looking behind the state court complaint and considering the totality of the evidence. Since, as we have shown, the Board had the authority to make such an inquiry, the subject matter of the suit was of course "pending before the Board [and] subject to its jurisdiction." As the court of appeals noted (Pet. App. A12), "the Board's power to enforce the provisions of sections 8(a)(1) and 8(a)(4) would be largely crippled if it could not order the withdrawal of a retaliatory lawsuit." See *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 146 (1971) ("The purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the [protection of] federal rights").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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